Fifth. That the special partner, Varnum, was not prohibited, by his relation to the firm, from purchasing the securities at the time of the sale by the pledgees.

Sixth. That the offer of Brown to pay the notes was sufficient, without an actual tender of the money, and that any tender was unnecessary, as the defendants' firm had, by the sale of the securities, rendered such tender fruitless.

It follows, therefore, that the plaintiff is entitled to a judgment directing an account of the moneys received on the securities which were pledged in 1846, and in stating such account; the balance due from the plaintiff on the loan must also be stated. As the complaint avers that such securities have been paid, and the same is not denied in the answer, the only further provision necessary in the judgment would be that the balance remaining unpaid by either party to the other should be recovered, and such order will be reserved until the report of the referee on the accounting is brought in.

Judgment for the plaintiff, that the defendants account, and reference ordered to Michael Ulshœffer, Esq., to take the account as to the certificates pledged in 1846, and report to this court. Further directions are reserved until the coming in of the report.

In the Court of Common Pleas, Philadelphia County.

TATHAM *vs.* THE WARDENS OF PHILADELPHIA.

1. It is settled that the writ of mandamus issues only where a ministerial act is to be done, and there is no other specific remedy. It is granted only at the discretion of the court to whom application is made.

2. By the act of 1851, the Board of Wardens on application of the owner of lands on the Delaware, within the limits of Philadelphia, is bound to cause to be defined, at the expense of the applicant, the line of low water mark bounding their jurisdiction, nor has this duty been affected by the Consolidation Act.

3. Windmill island, in the river Delaware, opposite the City of Philadelphia, is within the jurisdiction of the port wardens.

The opinion of the court was delivered by

ALLISON, J.—George N. Tatham presented his petition to this court, praying that a writ of mandamus be awarded, commanding J. E. Harned and others, wardens of the port of Philadelphia to cause to be defined upon the ground, at the expense of the applicant, the line of low water, bounding their jurisdiction of a certain lot on Windmill island, two hundred and fifty feet in breadth or front, east and west; bounded upon the line of low water mark by the river Delaware; on the south by the land of David Warren, and on the north by other land of the said Tatham.

The petition recites that the petitioner is the owner of the lot of ground above described, and that he made application in writing to the board of wardens, requesting them to cause said line of low water mark to be defined, which application was refused, and that on the first day of September last, he again applied to the board, asking them to reconsider their rejection of the prayer of his petition; and that this last communication was laid upon the table by the respondents, and that they continue to refuse to define for him the line bounding their jurisdiction upon the land mentioned in his petition. A rule was granted upon the said wardens to show cause why a writ of mandamus should not be awarded, as prayed for, and upon the return of the rule an answer was put in, showing cause why said rule should not be made absolute.

The first reason assigned is, that the remedy of the petitioner is by appeal, and not by writ of mandamus. This defence, if well taken, would be conclusive against the application; for the writ, not being a writ of right, is granted only at the discretion of the court, to whom application is made for its allowance; and this discretion is not exercised in favor of the applicant, unless some proper and lawful purpose be answered by the writ, 2 T. R. 385; 1 Cowen, 501, and then only where a ministerial act is to be done, and there is no other specific remedy, *Commonwealth* vs. *Judges of Philadelphia*, 3 Binney, 273; *Griffith* vs. *Cochran*, 5 Binney, 103. There are various acts of assembly giving appeals to the Courts of Common Pleas and Quarter Sessions from the decision of the

wardens in specific cases, but neither of them have any application to the case before us, unless as was argued, the 12th section of the act of April 28th, 1851, determines that the remedy in this case is by appeal, and therefore, not by mandamus. It says, that any person aggrieved by *any* decision of the board of wardens may have an appeal to the Court of Quarter Sessions or other courts, as provided by laws heretofore existing.

It may be questioned whether the remedies, "provided by laws heretofore existing," are not restricted to the specific cases mentioned in the several acts of assembly passed prior to the act of April 28, 1851, but a decision of this point becomes unnecessary, by reason of the conclusion at which we have arrived, that the refusal of the wardens to define the line of low water mark, as prayed for by the petitioner, is not a decision, or an act performed by them which can be appealed from; but is simply a refusal to do or perform an act imposed upon them as a ministerial duty. The 7th section of the act of April 28th, 1851, requiring that the board of wardens of the port of Philadelphia, on the application of the owner of land bounded by the Delaware and Schuylkill rivers, within the limits of the port, shall cause to be defined upon the ground, at the expense of the applicant, the line of low water mark bounding their jurisdiction. There is nothing here to be decided—no doubt to be solved—no controversy as between themselves and the petitioner, or litigant parties to be determined by them, and therefore nothing from which an appeal will lie. The act to be done is simple and specific; to define the line of low water mark, and so far from leaving it to the discretion or judgment of the wardens, the language of the law is imperative, *shall* cause, &c. An appeal, therefore, is not the proper remedy in this case.

The second reason assigned is, that the power given to the wardens, by the 7th section of the act of April 28th, 1851, has become vested in the Councils of the City of Philadelphia. This conclusion is drawn mainly from the 28th section of the act of consolidation, but it is a conclusion not warranted, we think, by any thing therein contained, for it provides that the wardens to be elected by councils, together with the master warden, shall do and perform the

duties which do now or may by law or ordinance hereafter, belong to the port wardens. The line which by this section the councils are required to fix, is the line *beyond* which no wharf or pier shall be constructed into the tideway of the river, and has no reference whatever to the line of low water mark, although it has been argued that the latter is dependent upon the former, and this is the reason assigned by the wardens for not defining the low water mark line upon Windmill Island It is difficult to understand how the mere fixing of a point or line, to govern the future extension of wharves, can in any way affect the line of low water mark upon the land of the petitioner. But if it could be made to appear that a certain alteration of the wharf line, by councils, might have the effect anticipated by the respondents, it would be no sufficient answer to the petition of the complainant to the wardens, because it is uncertain whether the present wharf line ever will be changed, and if changed, its effects are at best problematical.

The right of the petitioner to build his wharf to low water mark is a settled, clear and unquestionable right, not dependent or contingent, but an existing, immediate right, which may be exercised at any moment without permission from the board of wardens.. But as a heavy penalty is imposed upon any one who builds a wharf or pier into the tideway, beyond the line bounding the jurisdiction of the wardens, without first obtaining the authority of the board; and as the line is to some extent an arbitrary line, bare at low, and covered with water at high tide, the exact location of which is at all times somewhat uncertain, and therefore subject to be disputed; the law very wisely says to the wardens, you *shall* define this line; as upon you is imposed the duty of enforcing the penalty incurred by those who, without your authority, build beyond it. Before the passage of the act of 1851, every owner of land, bounded by the rivers Delaware and Schuylkill, who undertook to wharf in, between low water mark and the fast land, had to take upon himself the risk of an infringement upon the rights of the public; and an infringement of an inch was as fatal as the infringement of a foot, or an hundred feet; an error that any one was liable to fall into, ignorantly, or even in spite of every precaution that could be taken to

avoid such a mistake. The law as it then stood conceded the right to wharf in to a certain line, but had pointed out no way of ascertaining the true location of that line; and yet it said, if you build one hair's breadth beyond your proper limits, you shall pay $4,000, and remove the structure from the tideway beyond low water mark. To remedy this just cause of complaint, the act of 1851 was passed; the 7th section of which remains in full force, unaltered, and unaffected by the act of 1854.

The third ground upon which the answer goes, denies the jurisdiction of the wardens over Windmill Island.

The act of September 22, 1786, 2 Smith's Laws, 388, declares that the island shall be a part of Philadelphia, and by the 1st section of the act of consolidation, Windmill Island is made a portion of the fifth ward of the City of Philadelphia. By the 13th section of the act of the 29th March, 1803, it is provided that when any person shall be desirous to extend any wharf or other building of the nature of a wharf, in the tide way of the Delaware, from *any* part of the city or liberties of Philadelphia, they shall make application, &c. Windmill Island being a part of the city, and having been for seventeen years prior to the passage of the act of 1803, establishing the board of wardens, it is very plain that the island in question is as much under their jurisdiction, as is the western shore of the Delaware, in front of the city and liberties of Philadelphia; and the reason for bringing the island into subjection to the wardens, for the purposes covered by the act, is most obvious; for one of the most important objects to be accomplished by the passage of the law was the protection of the Delaware river front, and the establishment of a proper system of wharfage, as essential to the prosperity of the city; but this would all be to little purpose if the owners of the island could, by the extension of wharves from its western shore, obstruct the channel between the island and the city front to as great an extent as they might deem advisable.

But the 1st section of the act of Feb. 7, 1818, which is substantially a re-enactment of the 13th section of the act of 1803, is conclusive upon this point. It provides that all applications for the extension of wharves into the tide way of the Delaware river from

any part of the city, the Northern Liberties, District of Southwark, *or sand bar or island in front of said city*, shall be made to the board of wardens; Windmill Island is, beyond all doubt, covered by one or both of the phrases,—"any part of the city," or "sand bar or island in front of said city."

By the 5th section of the act of February 4th, 1846, a fine is imposed upon any one who shall fix, or cause to be fixed, any bulk, enclosure, or other obstruction in the tide way of the Delaware, upon any sand bar or island in front of the city, and the wardens are directed to have such obstruction abated or removed. And by the 7th section of the act of April 15th, 1850, it is declared that the act of 1840 shall not be construed to impair the rights of the riparian owners of Windmill Island, or any part thereof, to low water mark. These several acts seem to settle the question raised by the third reason, conclusively against the position taken by the respondents; but if it rested alone upon the 7th section of the act of 1851, upon which the application of the petitioner to the wardens was based, there would be no escape from the discharge of the duty therein enjoined, for the answer does not deny the ownership of the land mentioned in the petition, nor is it disputed that it is within the limits of the port of Philadelphia, nor that it is bounded by the Delaware river; these three facts being admitted, or proved if denied, it is the duty of the wardens to obey the directions of the act, irrespective of the question of prior, limited, or general jurisdiction.

The fourth objection is embraced in the second, and for the reasons already given, is not deemed a sufficient answer to the prayer of the petition.

The fifth answer is, that in point of fact it is impossible to fix the line of low water mark as prayed for by the petitioner. But it will not do to rest upon a mere assertion of inability; it is not pretended that an effort has been made to comply with the directions of the act, nor is the nature or character of the disability set out, that the court may judge whether it is a mere disinclination to perform the duty required, or an actual impediment, which renders it impossible for the respondents to do that which the law says they shall do. The law recognizes a line of low water mark; it recognizes it as the

line bounding the jurisdiction of the wardens, and to that line the owners of the fast land possess certain rights, which are beyond the control or interference of the respondents. And from all that appears in the pleadings before us, it can be as easily defined, upon the land of the petitioner as it can upon the land of any one bounded by the Delaware river, and until the contrary be shown, the presumption of law is, that an approximate, conventional line of low water mark can be defined by the Wardens, which, when settled and marked, will be treated as the true line between the petitioner and the respondents.

In answer to the sixth reason, it is sufficient to say, that of the advantages or disadvantages that would result to the navigation of the river, and to the trade and commerce of Philadelphia, we have in the determination of this question, no right to inquire, or to allow such considerations to influence in any degree, the rights of the parties to this proceeding. Being of the opinion that it is the clear right of the petitioner to build his wharf to low water mark, and this is the duty of the wardens upon the application which he presented to them, to cause to be defined that line for him, and no sufficient reason having been shown why they have not performed this duty imposed upon them by law, a peremptory mandamus is awarded, as prayed for; our practice being, instead of awarding an alternative mandamus, to hear the parties upon a rule to show cause why a peremptory mandamus should not be granted.

Rule absolute.

NOTICES OF NEW BOOKS.

ABRIDGMENT OF THE DEBATES OF CONGRESS, from 1789 to 1856. From Gale's and Seaton's Annals of Congress, from their Register of Debates, and from the official reported Debates, by John C. Rives. By the Author of the Thirty Years' View, Vol. 1. New York: D. Appleton and Company, 346 and 348 Broadway. London: 16 Little Britain, 1857. Philadelphia: J. K. Simon, Agent, No. 89 Walnut street, pp. 802.

This valuable and somewhat ponderous volume has just been laid upon our table. We have not been able as yet to examine it with as much care as we intend to, but so far as our examinations have extended, they have been most satisfactory. The work itself was needed. The historical knowledge which is to be gathered from the Congressional Debates, is at once highly instructive and most important. To no hands could it have been better confided than to Col. Benton's. By the time the second volume shall appear, we shall endeavor to give our readers some more satisfactory account of the work from a more careful perusal.